

September 29, 1997
FOR PUBLICATION

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

FILED
September 29, 1997
Cecil W. Crowson

STATE OF TENNESSEE,
Plaintiff-Appellee,

(
(
(
(
(Williamson Criminal
(
(Hon. Henry Denmark Bell
(Judge
(
(Appeal No. 01S01-9602-CC-00029
(
(
(

v.

JAMES DUBOSE,
Defendant-Appellant.

For Plaintiff-Appellee:

For Defendant-Appellant:

Charles W. Burson
Attorney General & Reporter
Nashville

Robert H. Plummer, Jr.
Franklin

Michael E. Moore
Solicitor General
Nashville

Michael W. Catalano
Associate Solicitor General
Nashville

Amy Tarkington
Assistant Attorney General
Nashville

Joseph D. Baugh
District Attorney General
Franklin

OPINION

JUDGMENT OF COURT OF CRIMINAL
APPEALS AND JUDGMENT OF TRIAL
COURT AFFIRMED.

REID, J.

This case presents for review the decision of the Court of Criminal

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50
51
52

1 Appeals affirming the conviction of James DuBose of first degree murder by
2 aggravated child abuse. The defendant was sentenced to imprisonment for life.
3 Permission to appeal was granted in order to review the trial court's ruling allowing
4 the introduction of evidence of prior injuries suffered by the victim.

6 I

7
8 The victim was 16-month-old Rufus Jones, Jr., whose death was
9 caused by the application of significant force, consistent with a blow with a fist to
10 his abdomen, which had developed massive internal scarring as the result of
11 older, undiagnosed injuries. The victim was pronounced dead at the hospital
12 emergency room at approximately 9 p.m. on July 3, 1993, where he was taken by
13 his mother, Ann Jones, and the defendant. Jones and the defendant were living
14 together in a mobile home with her children: Rufus, the victim; Nick, age 10; and
15 Joey, age 6. The defendant's son, Jamie, age 4, also lived with them.

16
17 The conviction is based on circumstantial evidence. On the date of
18 the victim's death, the defendant went to work and Jones and the children spent
19 the morning with a friend and her small child. After the defendant returned home
20 from work, he, Jones, and all the children visited in the home of the defendant's
21 parents until late afternoon, when they all, except Jamie, returned to the mobile
22 home. They remained together until some time later when Jones left to get pizza
23 and a movie video. When she left, the victim was sitting at the kitchen table
24 eating a hot dog. According to Jones, the victim had appeared to be well in the
25 morning but somewhat "lazy" later in the day. However, there was no evidence
26 that he sustained any injury during the day.

27
28 Nick testified that after his mother left to get the pizza and movie, the
29 victim fell asleep at the kitchen table and was carried by the defendant to the

1 bedroom. Nick stated that while the defendant and the victim were in the
2 bedroom he heard a noise, which the defendant explained to Nick was made by
3 some toys falling.

4
5 When Jones returned, the defendant told her that he had put the
6 victim to bed. She went into the bedroom and saw him lying on a blanket on the
7 floor. She assumed the child was asleep. Later, the defendant went into the
8 bedroom and returned carrying the victim. He told Jones the child was not
9 breathing. The victim vomited when his mother gave him mouth to mouth
10 resuscitation; otherwise, he exhibited no sign of life.

11
12 At the hospital, the defendant stated that he found the child pinned
13 between the bed and the wall. His explanation was that the victim had dropped
14 his bottle behind the bed and had been trying to retrieve it. The detective who
15 investigated the death visited the home that night. He made numerous
16 photographs and measured the distance between the bed and the wall. When the
17 detective returned the next day, he found under the bed a baby's bottle which had
18 not been there the previous night. The detective also noticed that the bed had
19 been moved a few inches farther away from the wall. Lastly, the detective
20 discovered a rolled up blanket which the mother identified as the blanket on which
21 the victim had been lying on the night he died. The blanket was damp in one spot
22 with what appeared to be blood and mucus. The stain on the blanket was
23 consistent with a sample of blood taken from the victim.

24
25 The medical examiner, Dr. Julia Goodin, performed the autopsy.
26 She testified that the victim's abdominal cavity was full of blood, there were
27 contusions on the intestines, and lacerations or tearing on the connective tissue to
28 the small intestines, which likely were caused by a knuckle on the perpetrator's
29 fist. The injury which caused the tearing probably had occurred within 24 hours of

1 death and certainly had occurred within 36 hours of death. Exterior bruises on the
2 victim corresponded to the internal abdominal injuries. The bruises were
3 consistent with blows to the abdomen with a fist. According to Dr. Goodin, this
4 type of blow typically is administered by an adult, not another child. In Dr.
5 Goodin's opinion, the defendant's explanation of what happened was inconsistent
6 with the injuries she observed. She testified that there was no indication that the
7 child had been pinned in any way, nor were there signs of asphyxiation.

8
9 Dr. Goodin also testified that there was evidence of other internal
10 injuries in the abdominal area which were at least a week old and could have been
11 several months old. She stated that the old injuries had been caused by
12 significant force and had resulted in internal scarring. Her conclusion was that the
13 mass of scarring caused by the old injuries prevented the soft connective tissue
14 from moving freely in the abdominal cavity when force was applied, thereby
15 resulting in the tearing which caused the child to bleed to death. In addition, Dr.
16 Goodin testified that on various parts of the body there were exterior contusions
17 and bruises, some of which were as much as a week old. She also found
18 evidence of prior contusions to the back of the scalp area which had resulted in
19 the development of scar tissue between the scalp and the skull. The medical
20 examiner did not associate the injuries to the victim's head with his death.

21
22 In addition to the injuries found by the medical examiner, proof was
23 introduced concerning an incident in March 1993 when the victim's fingers were
24 injured while he was with the defendant; the defendant told Jones that the victim
25 had smashed his fingers in the cabinet door. Because the defendant had taken
26 the child to his sister's house, the mother did not see the fingers until later the next
27 day. Two of the victim's fingernails were missing and there was pus on the
28 fingers. She immediately took the victim to the emergency room where he was
29 treated by Dr. Woodrow Wilson. Dr. Wilson concluded that the injuries were

1 inconsistent with the fingers being accidentally smashed in a cabinet door,
2 although it was possible that the victim could have sustained the injury by placing
3 his fingers in the hinged door of the cabinet and then pulling his fingers while
4 pushing against the cabinet door. He described the injury as a “superficial
5 degloving,” in which the skin is peeled off and there are no fractures. He
6 suspected child abuse and discussed his concerns with the mother.

7
8 Harvey Wood, the mother’s brother-in-law and also the defendant’s
9 uncle, testified that the defendant showed hostility toward the victim. Wood
10 explained that the defendant disliked the victim’s father, Rufus Jones, Sr. The
11 defendant had told Wood that the victim “looked just like his daddy, sounded like
12 his daddy, cried like his daddy and that he couldn’t stand that little bastard either.”
13 Wood testified that on one occasion he had seen the defendant strike the victim
14 on the head. Wood also stated that the defendant had tried to get him to change
15 his testimony.

16
17 The defendant’s basic defense was that there was not sufficient
18 admissible evidence to prove the charge. The defendant initially claimed that the
19 child’s death was accidental - that it was caused by his becoming caught between
20 the bed and the wall. At trial, he insisted that there was no evidence showing the
21 cause of the fatal injury, that the evidence showed the injury could have been
22 caused accidentally by the children at play or intentionally by persons other than
23 the defendant. The Court of Criminal Appeals, however, found that the evidence,
24 though circumstantial, was sufficient to support the conviction. The defendant’s
25 application for permission to appeal the sufficiency of the evidence was not
26 granted. The only issue before this Court is the admissibility of the evidence of
27 prior injuries.

1

2

The defendant contends that the trial court committed reversible error in allowing the jury to hear evidence of the prior injuries sustained by the victim. He objects specifically to the testimony of the mother and of the emergency room physician about the injury to the victim's fingers in March 1993 and the testimony of the medical examiner about the prior internal and external injuries. The State contends that the evidence was admissible to show the cause of death, and also that the injury was caused "knowingly, other than by accidental means," as provided in Tenn. Code Ann. § 39-15-401(a)(1991). The defendant would invoke Rule 404(b) of the Tennessee Rules of Evidence to exclude the evidence of prior injuries. He contends that the evidence was not probative of any element of the offense and, further, even if relevant its probative value was outweighed by unfair prejudice.

14

15

III

16

17

The first issue to be resolved is the standard of review of the trial court's decision regarding the admissibility of the evidence. The standard of review where the decision of the trial judge is based on the relevance of the proffered evidence under Rules 401¹ and 402² is abuse of discretion. Neil P. Cohen et al., Tennessee Law of Evidence § 401.5 at 86-87 (3d ed. 1995); Dockery v. Board of Professional Responsibility, 937 S.W.2d 863, 866 (Tenn. 1996); cf. State v. Porterfield, 746 S.W.2d 441, 450 (Tenn.), cert. denied, 486

23

¹ "‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401.

² "All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible." Tenn. R. Evid. 402.

1 U.S. 1017 (1988). Where the admissibility of the proffered evidence must also
2 comply with Rule 404(b)³ and the trial court has followed the procedure mandated
3 by that rule, it appears that the same standard, abuse of discretion, would be
4 applicable. See State v. Brewer, 932 S.W.2d 1, 24 (Tenn. Crim. App. 1996).
5 However, in view of the strict procedural requirements of Rule 404(b), the decision
6 of the trial court should be afforded no deference unless there has been
7 substantial compliance with the procedural requirements of the Rule. The
8 procedure for determining admissibility of evidence of other “crimes, wrongs, or
9 acts” is set forth in the rule.⁴ The court must find on “evidence heard outside the
10 jury’s presence” that the evidence is relevant to a “material issue” and that the
11 probative value of the evidence is not “outweighed by the danger” that the
12 evidence will cause unfair prejudice. Tenn. R. Evid. 404(b)(1)(2) & (3); State v.
13 McCary, 922 S.W.2d 511, 513-14 (Tenn. 1996). If the evidence is admitted, the
14 trial court “must upon request state on the record” the material issue to which the
15 evidence is relevant and the court’s reasons for admitting the evidence. Id. at
16 404(b)(2). The trial court did not comply fully with these procedures. However,
17 where, as in this case, there was a hearing outside the presence of the jury, but
18 the trial court failed to determine and state on the record the material issue to

³Rule 404(b) provides as follows:

(b) Other Crimes, Wrongs, or Acts. -- Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence; and

(3) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

⁴Rule 404(b) was drafted in response to this Court’s opinion in State v. Parton, 694 S.W.2d 299 (Tenn. 1985). In Parton, “the Court established precise procedures to emphasize that evidence of other crimes should usually be excluded.” Tenn. R. Evid. 404(b) advisory commissions’ comments.

1 which the evidence was relevant and also failed to find that the probative value of
2 the evidence was not outweighed by the danger of unfair prejudice, the
3 determination of admissibility will be made by the reviewing court on the evidence
4 presented at the jury out hearing.

6 IV

7
8 Since in this case the Court must apply a different standard of review
9 if Rule 404(b) is applicable, the next issue to be considered is whether the
10 admissibility of the evidence of prior injuries is controlled by Rules 401 and 402 or
11 whether Rule 404(b) is also applicable. The admissibility of the evidence of prior
12 injuries to the victim's abdominal area, and the evidence of prior injuries to the
13 victim's hand and head, must be considered separately.

14
15 In regard to the evidence of prior injuries to the victim's abdominal
16 area, the defendant contends that the medical examiner's testimony regarding
17 prior injuries is irrelevant unless the injuries can be attributed to the defendant.
18 That interpretation is unduly restrictive of the meaning of relevance. Rule 404(b)
19 applies to "evidence of other crimes, wrongs or acts" of the person on trial, and
20 excludes evidence of such acts only when offered for the purpose of proving
21 character or trait of character. State v. Nichols, 877 S.W.2d 722, 732 (Tenn.
22 1994), cert. denied, 513 U.S. 1114 (1995). Evidence of crimes, wrongs or acts, if
23 relevant, are not excluded by Rule 404(b) if they were committed by a person
24 other than the accused and are only conditionally excluded if committed by the
25 accused. Since the evidence admitted did not show the identity of the person who
26 caused the prior abdominal injuries sustained by the victim, it was not inadmissible
27 under Rule 404(b) as reflecting upon the character of the defendant.

28
29 Consequently, the admissibility of the evidence is dependent upon

1 its relevance under rules 401 and 402. The relevance of proffered evidence is
2 determined by the issues presented for resolution in the trial, which, in turn, are
3 determined by the elements of the offense charged and the defense asserted by
4 the accused. As stated in the Advisory Commission Comment to Rule 401, “[t]o
5 be relevant, evidence must tend to prove a material issue.”
6

7 The defendant was charged with and convicted of first degree
8 murder by aggravated child abuse, which was defined as: “A reckless killing of a
9 child less than thirteen (13) years of age, if the child's death results from
10 aggravated child abuse, as defined by § 39-15-402, committed by the defendant
11 against the child.” Tenn. Code Ann. § 39-13-202(a)(4) (Supp. 1993) (current
12 version at § 39-13-202(a)(2) (Supp. 1996)). The offense of aggravated child
13 abuse is defined in the statute as follows: “A person is guilty of the offense of
14 aggravated child abuse who commits the offense of child abuse as defined in §
15 39-15-401 and: (1) The act of abuse results in serious bodily injury to the child; or
16 (2) A deadly weapon is used to accomplish the act of abuse. ...” Tenn. Code Ann.
17 § 39-15-402 (a)(1991). The offense of child abuse was defined as follows: “Any
18 person who knowingly, other than by accidental means, treats a child under
19 eighteen (18) years of age in such a manner as to inflict injury or neglects such a
20 child so as to adversely affect the child's health and welfare is guilty of a Class A
21 misdemeanor.” Tenn. Code Ann. § 39-15-401 (a)(1991)(amended
22 1994)(emphasis added). These statutes required, for conviction of first degree
23 murder by aggravated child abuse, proof that the defendant knowingly, other than
24 by accidental means, inflicted upon the victim serious bodily injury that caused his
25 death.
26

27 Here, the evidence of prior injuries to the abdominal area was
28 admissible to show causation. According to Dr. Goodin, the scarring of the
29 abdominal area caused by the prior injuries created a condition which allowed the

1 later blows to cause the injuries which resulted in the victim's death. This
2 evidence was relevant to causation regardless of the identity of the perpetrator.
3 The external bruises to the abdomen were consistent with the internal injuries and
4 were in fact evidence of the same injuries. Thus the prior injuries to the
5 abdominal area were admissible because they directly related to the cause of
6 death and also because they tended to prove that the injuries were caused by
7 someone intentionally and not accidentally.

8
9 The next issue is whether the probative value of the evidence of the
10 abdominal injuries was outweighed by the danger of unfair prejudice. Since, as
11 stated above, Rule 404(b) is not applicable to this evidence, its admissibility must
12 be considered under Rule 403, Tennessee Rules of Evidence.⁵ Rule 403 permits
13 a court to exclude relevant evidence "if its probative value is substantially
14 outweighed by the danger of unfair prejudice." (Emphasis added.) The Court has
15 stated that unfair prejudice is "[a]n undue tendency to suggest decision on an
16 improper basis, commonly, though not necessarily, an emotional one." State v.
17 Banks, 564 S.W.2d 947, 951 (Tenn. 1978); see also State v. McCary, 922 S.W.2d
18 at 515. The medical examiner's testimony regarding prior injuries to the victim
19 was not particularly graphic or emotional. Rather, the testimony simply recounted
20 in a clinical manner the location of various bruising and scarring on the victim's
21 body. There was no supposition as to who caused the prior injuries. The Court
22 concludes that the probative value of this evidence was not substantially
23 outweighed by the danger of unfair prejudice as required for exclusion under Rule
24 403, and, therefore, that the trial judge did not abuse his discretion in allowing its
25 admission.

26

⁵ " Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Tenn. R. Evid. 403.

1 The remaining issues concern the admissibility of the testimony
2 about the injury to the victim’s fingers in 1993 and the testimony regarding injuries
3 to his head. Because, on the evidence, the defendant could be identified as the
4 person responsible for these injuries, admissibility of the evidence is governed by
5 Rule 404(b). First, the evidence that the defendant was responsible for the hand
6 and head injuries must be clear and convincing as required under Rule 404(b)
7 analysis. See State v. McCary, 922 S.W.2d at 514; State v. Parton, 694 S.W.2d
8 at 303. Then, two issues must be determined: whether there was a material
9 issue, other than conduct conforming with a character trait, to which evidence of
10 the injury to the victim’s fingers was relevant; and, if so, whether the probative
11 value of the evidence outweighed the danger of unfair prejudice. Id. The test for
12 relevance under Rule 401, that the evidence tends to prove a material issue, is
13 the same under Rule 404(b). However, the test in Rule 404(b) for balancing
14 probative value against prejudicial effect differs from that established in Rule 403.
15 To be excluded under Rule 403, the danger of unfair prejudice must “substantially
16 outweigh” the probative value. Under Rule 404(b), however, the danger of unfair
17 prejudice must simply “outweigh” the probative value. The restrictive approach of
18 Rule 404(b) recognizes that evidence of other crimes, wrongs or acts carries a
19 significant danger of unfair prejudice. Tennessee Law of Evidence, § 404.7 at
20 172.

21
22 The evidence of the injury to the victim’s hand in 1993 and that he
23 was struck on the head by the defendant was relevant to two closely related
24 material issues: intent and absence of accident. The statutes defining the
25 offense require proof that the act of abuse was committed “knowingly” and not by
26 “accidental means.”⁶ Since the defendant claimed the injury was accidental and,
27 apparently in the alternative, if the injury was inflicted intentionally it could have

⁶Intent and absence of accident are closely related factual issues. Tennessee Law of Evidence, §§ 404.9, 404.10.

1
2
3
4
5
6
7
8
9
10
11
12
13

Costs are taxed against the defendant.

Reid, J.

Concur:

Anderson, C.J., Drowota, and
Holder, JJ.

Dissenting Opinion:

Birch, J.